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15 *[Refer to signature pages for complete list of parties represented]*

16
17 UNITED STATES DISTRICT COURT
18 NORTHERN DISTRICT OF CALIFORNIA

19 UNITED STATES OF AMERICA, and
20 PEOPLE OF THE STATE OF CALIFORNIA, *ex rel.*
21 CALIFORNIA AIR RESOURCES BOARD,

22 *Plaintiffs,*

23 v.

24 KOHLER CO.,

25 *Defendant.*

26 **COMPLAINT**

1 The United States of America, by authority of the Attorney General of the United States
 2 and at the request of the Administrator of the United States Environmental Protection Agency
 3 (“EPA”), and the People of the State of California, *ex rel.* California Air Resources Board
 4 (“CARB”), through the California Office of the Attorney General, allege as follows:

5 **NATURE OF ACTION**

6 1. This is a civil action against Kohler Co. (“Kohler”) brought pursuant to Sections
 7 203, 204, 205, and 213(d) of the Clean Air Act (the “CAA” or “Act”), 42 U.S.C. §§ 7522, 7523,
 8 7524, 7547(d), and regulations promulgated pursuant to Section 213(a) of the Act, 42 U.S.C. §
 9 7547(a), and codified at 40 C.F.R. Parts 90 (Control of Emissions from Nonroad Spark-Ignition
 10 Engines At or Below 19 Kilowatts), 1054 (Control of Emissions from New, Small Nonroad
 11 Spark-Ignition Engines and Equipment), 1065 (Engine-Testing Procedures), and 1068 (General
 12 Compliance Provisions for Highway, Stationary, and Nonroad Programs).

13 2. This civil action is also brought pursuant to California Health and Safety Code
 14 Sections 43016, 43017, and 43154, and regulations promulgated pursuant to Sections 39600,
 15 39601, 43013, 43016, 43017, 43101, 43102, and 43104 of the California Health and Safety Code
 16 and adopted in Title 13 California Code of Regulations (“CCR”) § 2400 *et seq.* (Small Off-Road
 17 Engines or “SORE”); 13 CCR § 2407 *et seq.* (New Engine Compliance and Production Line
 18 Testing – New Small Off-Road Engine Selection, Evaluation, and Enforcement Action); 13 CCR
 19 § 2408 *et seq.* (Emission Reduction Credits); 13 CCR § 2430 *et seq.* (Large Spark-Ignition
 20 Engines or “LSI”). These regulations incorporate the following test procedures: California
 21 Exhaust Emission Standards and Test Procedures for 2005-2012 Small Off-Road Engines
 22 (adopted July 26, 2004 and amended October 25, 2012) (hereinafter, “2005-2012 California Test
 23 Procedures”); California Exhaust Emission Standards and Test Procedures for New 2013 and
 24 Later Small Off-Road Engines; Engine Testing Procedures (Part 1054) (adopted October 25,
 25 2012) (hereinafter, “California 1054 Test Procedures”); and California Exhaust Emission
 26 Standards and Test Procedures for New 2013 and Later Small Off-Road Engines; Engine-Testing
 27 Procedures (Part 1065) (adopted October 25, 2012) (hereinafter, “California 1065 Test
 28 Procedures”) (collectively, “California Test Procedures”). The California Test Procedures

1 incorporate certain provisions of 40 C.F.R. Parts 1054 and 1065 by reference with some
2 additions and deletions.

3 3. This action involves Kohler's manufacture and sale of nonroad, nonhandheld
4 spark-ignition engines nationwide, including in California (which include both SORE engines
5 and LSI engines with displacement equal to or less than 1.0 liter (hereinafter, "LSI engines")
6 under California's regulations) (collectively, "Small SI engines") that failed to comply with the
7 applicable certification requirements set forth in 40 C.F.R. Parts 90 ("Part 90"), 1054 ("Part
8 1054"), 1065 ("Part 1065"), and 13 CCR §§ 2403(d) and 2433(d), which incorporate the
9 California Test Procedures. These Small SI engines do not conform in all material respects to the
10 engine specifications described in the applications for the certificates of conformity ("COCs") or
11 CARB executive orders ("EOs") that purportedly cover them. Kohler therefore violated Section
12 203(a)(1) of the CAA, 42 U.S.C. § 7522(a)(1) and 13 CCR §§ 2403(b)-(e), 2408, and 2433 (b)-
13 (d), by selling uncertified Small SI engines nationwide, including in California. The United
14 States and CARB seek civil penalties and injunctive relief for these violations.

15 4. Kohler also developed and installed a calibration on its electronic fuel-injected
16 ("EFI") Small SI engines equipped with Delphi electronic control modules ("ECMs") that
17 contained a fueling strategy that significantly reduced emissions of oxides of nitrogen ("NOx")
18 during certification testing when compared to in-use operation. Kohler violated Sections
19 203(a)(1) and 203(a)(3)(B) of the CAA, 42 U.S.C. §§ 7522(a)(1), 7522(a)(3)(B), California
20 Health and Safety Code §§ 43016, 43154, and 13 CCR §§ 2403(d) and 2433(d), by failing to
21 disclose the fueling strategy equipped on these engines, and by manufacturing, selling, and
22 installing defeat devices on Small SI engines nationwide, including in California. The United
23 States and CARB seek civil penalties and injunctive relief for these violations.

24 5. Also, each certification application is a "report" within the meaning of Section
25 208(a) of the CAA, and 13 CCR §§ 2403(d) and 2433(d). Consequently, Kohler's failure to
26 disclose AECDs and adjustable parameters in EPA and CARB certification applications
27 constituted violations of Section 203(a)(2) of the CAA, 42 U.S.C. § 7522(a)(2), and 13 CCR §§
28 2403(d) and 2433(d) (incorporating the requirements of California 1054 Test Procedures, §§

1 1054.115(b), 1054.201, and 1054.205(b) and (q)), which prohibit any person from providing
2 false or incomplete information in reports to EPA or CARB. Kohler also violated Section
3 203(a)(2) by submitting incomplete production line testing (“PLT”) reports and inaccurate
4 averaging, banking, and trading (“ABT”) reports to EPA. In addition, Kohler submitted
5 incomplete or inaccurate PLT reports and inaccurate ABT reports to CARB, and failed to submit
6 required ABT reports to CARB, in violation of 13 CCR §§ 2403, 2407(c)(4)(E), 2408(i), and
7 2433. The United States and CARB seek civil penalties and injunctive relief for these violations.

8 6. Finally, Kohler manufactured and offered for sale in California SORE engines
9 that did not conform in all material respects to the engine specifications described in the
10 applications for the EO that purportedly covered them because the engines did not meet the
11 applicable diurnal evaporative emission control requirements, in violation of 13 CCR §§ 2754-
12 2765.

13 **JURISDICTION, VENUE, AND INTRADISTRICT ASSIGNMENT**

14 7. This Court has jurisdiction over the subject matter of this action pursuant to
15 Section 205(b) of the Act, 42 U.S.C. § 7524(b), 28 U.S.C. §§ 1331 (Federal Question), 1345
16 (United States as Plaintiff), and 1355 (Fine, Penalty, or Forfeiture), and Section 304 of the Act,
17 42 U.S.C. § 7604 (Citizen Suits). Pursuant to Section 304 of the Act, CARB served its notice of
18 violation and intent to sue on November 13, 2019. This Court also has supplemental jurisdiction
19 over the state law claims because they are part of the same case or controversy as the claims over
20 which the Court has jurisdiction. 28 U.S.C. § 1367.

21 8. Venue is proper in this District pursuant to Section 205(b) of the Act, 42 U.S.C. §
22 7524(b), and 28 U.S.C. §§ 1391(b) and 1395(a), because a substantial part of the acts for which
23 Plaintiffs seek civil penalties occurred in this District.

24 9. Intradistrict Assignment: EPA Region 9 is headquartered in San Francisco. Civil
25 Local Rule 3-2(d) for the Northern District of California provides for assignment to the San
26 Francisco Division or the Oakland Division.

PARTIES

10. Plaintiff United States of America has authority to bring this action on behalf of the EPA Administrator under Section 305 of the Act, 42 U.S.C. § 7605, and 28 U.S.C. §§ 516 and 519.

11. This action is also brought by the People of the State of California, *ex rel.* CARB.

12. Plaintiff CARB is a public agency of the State of California within the California Environmental Protection Agency. The mission of CARB is to promote and protect public health, welfare, and ecological resources of California's citizens through the monitoring and protection of air quality. CARB's major goals include providing safe, clean air to all Californians, reducing California's emission of air pollution, and providing leadership and innovative approaches for implementing air pollution controls. CARB is the agency responsible for ensuring California's compliance with the regulations at issue here.

13. Defendant Kohler is an American company incorporated under the laws of the State of Wisconsin with its principal place of business in Kohler, Wisconsin.

14. Kohler is a "manufacturer" within the meaning of Section 216(1) of the Act, 42 U.S.C. § 7550(1), and in California a "large volume manufacturer" within the meaning of 13 CCR § 1900(b) and "engine manufacturer" within the meaning of 13 CCR § 2433(b)(16).

15. Kohler is a "person" within the meaning of Section 302(e) of the Act, 42 U.S.C. § 7602(e), and in California, Health and Safety Code § 39047.

16. At all times relevant to this action, Kohler was engaged in the business of manufacturing, selling, offering for sale, introducing into commerce, delivering for introduction into commerce, or importing (or causing the foregoing with respect to) Small SI engines in the United States within the meaning of the CAA and in California within the meaning of 13 CCR §§ 2401(a) and 2430(a)(2).

STATUTORY AND REGULATORY BACKGROUND

17. This case arises under Part A of Section II of the Act, 42 U.S.C. § 7521 *et seq.*, and the regulations promulgated thereunder, and Division 26, Part 5 of California's Health and Safety Code, and the regulations promulgated thereunder, which aim to protect public health and

1 the environment by reducing emissions of NO_x, hydrocarbons (“HC”), and other pollutants from
2 mobile sources of air pollution, including Small SI engines.

3 18. NO_x contributes to the formation of ozone (colloquially referred to as smog) and
4 fine particulate matter (“soot”), exposure to which is linked to a number of respiratory- and
5 cardiovascular-related health effects as well as premature death. Children, seniors, people who
6 are active outdoors (including outdoor workers), and people with pre-existing cardiovascular and
7 respiratory conditions are particularly at risk for adverse health effects related to smog and soot
8 exposure. Nitrogen dioxide formed by NO_x emissions can aggravate respiratory diseases,
9 particularly asthma, and may also contribute to asthma development in children.

10 19. The Act requires EPA to prescribe and revise, by regulation, standards applicable
11 to the emission of any air pollutant from new motor vehicles or new motor vehicle engines which
12 cause or contribute to air pollution which may reasonably be anticipated to endanger public
13 health or welfare. 42 U.S.C. § 7521(a)(1). Section 213(a)(3) of the Act requires EPA to
14 promulgate standards for nonroad equipment that will achieve the greatest degree of emission
15 reduction available, and requires that EPA consider standards equivalent in stringency to those
16 applicable to motor vehicles. 42 U.S.C. § 7547(a)(3). Further, Section 213(d) states that nonroad
17 vehicle and engine standards, “shall be enforced in the same manner as standards prescribed
18 under Section 202 [of the Act, 42 U.S.C. § 7521,]” for motor vehicles and motor vehicle engines,
19 and that the Administrator “shall revise or promulgate regulations as may be necessary to
20 determine compliance with, and enforce, standards in effect under [Section 213 of the Act].”
21 42 U.S.C. § 7547(d).

22 20. In California, the Health and Safety Code requires CARB to adopt and implement
23 motor vehicle emission standards for the control of air contaminants and sources of air pollution,
24 including off-road and nonvehicle engine categories. Cal. Health & Saf. Code § 43101.
25 California first adopted regulations for SORE engines in 1992 and LSI engines in 1999.

26 21. Pursuant to Section 213 of the Act, EPA administers a certification program to
27 ensure that Small SI engines introduced into commerce in the United States meet applicable
28 emission standards. Under this program, EPA issues COCs which represent EPA’s pre-approval

1 of the importation or introduction of covered Small SI engines into commerce. To obtain a COC,
2 a manufacturer must submit a certification application to EPA for each model year (“MY”)
3 engine family that it intends to introduce into commerce. 40 C.F.R. §§ 90.107 and 1054.201.
4 California has a similar process. Instead of issuing a COC, CARB issues an EO, which
5 represents CARB’s pre-approval of the importation or introduction of covered SORE or LSI
6 engines into California. Cal. Health & Saf. Code §§ 39515 and 39516; 13 CCR §§ 2400(a)(2)
7 and 2430(a)(2).

8 22. Engines are covered by a COC or an EO only if they conform in all material
9 respects to the description in the certification application. 40 C.F.R. § 1068.103(c)(1)
10 (incorporated by reference at 40 C.F.R. § 1054.15(c)); 13 CCR § 2405(b)(2) (incorporated by
11 reference at California 1054 Test Procedure, § 1054.205(u)). Manufacturers are prohibited from
12 selling, offering for sale, introducing into commerce, delivering for introduction into commerce,
13 or importing, any new engine unless that engine is covered by an EPA-issued COC. CAA §
14 203(a)(1), 42 U.S.C. § 7522(a)(1); 40 C.F.R. § 1068.101(a)(1) (incorporated by reference at 40
15 C.F.R. § 1054.15(c)). It is also a violation to cause any of the foregoing acts. CAA § 203(a), 42
16 U.S.C. § 7522(a). Similarly, in California, manufacturers are prohibited from manufacturing for
17 sale, selling, offering for sale, or introducing, delivering, importing into California for
18 introduction into commerce, any SORE or LSI engine unless it is covered by a CARB-issued
19 EO. 13 CCR §§ 2400(a)(2) and 2430(a)(2).

20 23. This action pertains to Kohler’s MYs 2011-2016 Small SI engines, which are
21 governed by Parts 90 and 1054 and the California Test Procedures. Part 90 applies to Kohler’s
22 MY 2011 Small SI engines with a displacement less than 225 cubic centimeters. Part 1054
23 applies to the remainder of Kohler’s MYs 2011-2016 Small SI engines.

24 24. There are several aspects of the Small SI engine certification program relevant to
25 this complaint, which are summarized below. The summary focuses on the Part 1054
26 requirements because a substantial majority of Small SI engines identified in this complaint are
27 governed by those provisions. Part 90 includes similar requirements that apply to Kohler’s MY
28 2011 Small SI engines with a displacement less than 225 cubic centimeters.

1 **A. Emission Standards for Small SI Engines**

2 25. The Act directs EPA to study emissions from nonroad engines and to establish
3 emission standards if emissions from nonroad engines contribute significantly to nonattainment
4 areas or to air pollution which may be reasonably be anticipated to endanger public health or
5 welfare. CAA § 213(a)(1)-(4), 42 U.S.C. § 7547(a)(1). Specific statutory direction to propose
6 standards for Small SI engines comes from section 428(b) of the 2004 Consolidated
7 Appropriations Act, which requires EPA to propose regulations under the Act “that shall contain
8 standards to reduce emissions from new nonroad spark-ignition engines smaller than 50
9 horsepower.” Pub. L. 108–199, Div G, Title IV, § 428(b), 118 Stat. 418 (January 23, 2004).

10 26. The California Health and Safety Code directs CARB to adopt and implement
11 emission standards for mobile sources, which CARB has found to be necessary, cost effective,
12 and technologically feasible, to reduce air pollution and accomplish the attainment of the state
13 standards at the earliest practicable date. Cal. Health & Saf. Code §§ 43101, 43000.5, 43013,
14 43018.

15 27. Both federal and state regulations contain exhaust emission standards for HC plus
16 NO_x (“HC + NO_x”) that apply to Small SI Engines. *See* 40 C.F.R. § 1054.105 (specifying
17 emission standards for nonhandheld Small SI engines); 13 CCR §§ 2403(b) and 2433(b) (same).
18 The specific numeric standards for HC + NO_x are referred to herein as “default limits.” The
19 default limits vary depending on the engine displacement class.

20 28. As an alternative to meeting the default limits, a manufacturer may participate in
21 the ABT program (except for LSI engines sold in California). *See* 40 C.F.R. §§ 1054.105(b),
22 1054, Subpart H; 13 CCR §§ 2403(e), 2408 *et seq.*, and 2433(b).

23 29. The ABT programs allow a manufacturer to choose a HC + NO_x limit for each of
24 its engine families (subject to certain emission “caps”). *See* 40 C.F.R. § 1054.105(b); 13 CCR §§
25 2403(e) and 2408 *et seq.*; California 1054 Test Procedures, § 1054.105(b). This limit – called a
26 “Family Emission Limit” or “FEL” – serves as the applicable emission standard for the engine
27 family. 40 C.F.R. § 1054.105(b); 13 CCR §§ 2403(e) and 2408(b)(2); California 1054 Test
28 Procedures, § 1054.105(b).

30. The maximum FEL (or “cap”) for a Class II Small SI engine is 12.1 g/kW-hr. 40 C.F.R. § 1054.105(b); 13 CCR §§ 2408(b)(6) and 2409 *et seq.*

31. A manufacturer generates emission credits when the FEL is less than the default limits. These credits can be used to offset emissions from engine families that have FELs higher than the default limits, banked for use in future years, or traded to another manufacturer. The manufacturer must not, at the end of the year, have a negative ABT emissions credit balance. *See* 40 C.F.R. §§ 1054.710 and 1054.730(c)(1); 13 CCR §§ 2408(b)(5) and 2409 *et seq.*

32. Manufacturers who participate in the ABT program must submit to EPA an end-of-year report within 90 days after the end of the model year and a final report within 270 days after the end of the model year. 40 C.F.R. § 1054.730(a). These reporting deadlines are the same under CARB regulations for both the end-of-year reports and final reports. 13 CCR §§ 2408(i)(3)(A)-(B) and 2409(h). These reports must contain the number of emission credits generated or used for each engine family and the net balance of emission credits from all the manufacturer’s participating engine families. 40 C.F.R. §§ 1054.730(b) and (c); 13 CCR §§ 2408(i) and 2409(h). Kohler participated in the ABT programs prior to and during the relevant time period, and continues to participate in the ABT programs.

B. Test Cycle

33. For certification purposes, nonhandheld Small SI engines are tested under a six-mode duty cycle. 40 C.F.R. § 1054.505(b)(2); California 1054 Test Procedures, § 1054.505(b)(2). During mode 6, which is a no-load mode at idle speed, manufacturers must allow the engine to operate at the idle speed determined by the installed governor. 40 C.F.R. §§ 1054.505(b), (c)(1); California 1054 Test Procedures, §§ 1054.505(b), (c)(1). During mode 1, which is full-load operation, the regulations instruct the following:

[S]elect a test speed of either 3060 [revolutions per minute (rpm)] or 3600 rpm that is most appropriate for the engine family. If all the engines in the engine family are used in intermediate-speed equipment, select a test speed of 3060 rpm. The test associated with intermediate-speed operation is referred to as the A Cycle. If all the engines in the engine family are used in rated-speed equipment, select a test speed of 3600 rpm. The test

associated with rated-speed operation is referred to as the B Cycle. If an engine family includes engines used in both intermediate-speed equipment and rated-speed equipment, select the test speed for emission-data engines that will result in worst-case emissions. 40 C.F.R. § 1054.505(d)(1); California 1054 Test Procedures, § 1054.505(d)(1). “Rated-speed equipment” is defined as “nonhandheld equipment in which the installed engine is intended for operation at a rated speed that is nominally 3600 rpm or higher.” 40 C.F.R. § 1054.801. In California, the definition is similar but omits the word “nonhandheld” before the word “equipment.” California 1054 Test Procedures, § 1054.801. “Intermediate-speed equipment” is defined as “nonhandheld equipment in which the installed engine is intended for operation at speeds substantially below 3600 rpm.” 40 C.F.R. § 1054.801; California 1054 Test Procedures, § 1054.801.

34. For modes 2-5 (which are run at various loads between no load and full load), manufacturers may either test the engines at the test speeds prescribed by Test Cycle A or B (as applicable) or let the installed governor control engine speed (which is referred to as “variable speed” testing). 40 C.F.R. § 1054.505(b); California 1054 Test Procedures, § 1054.505(b).

35. During the relevant time period, Kohler elected to test its Small SI Engines at the test speeds prescribed by Test Cycle A or B in modes 2-5.

C. Disclosure of AECDs/Adjustable Parameters

36. Certification applications must, among other things, describe in detail all AECDs and adjustable parameters equipped on the engines in that engine family. 40 C.F.R. §§ 1054.205(b), (q); California 1054 Test Procedures, §§ 1054.205(b), (q).

37. An AECD is defined as “any element of design that senses temperature, motive speed, engine RPM, transmission gear, or any other parameter for the purpose of activating, modulating, delaying, or deactivating the operation of any part of the emission control system.” 40 C.F.R. § 1054.801; California 1054 Test Procedures, § 1054.801.

38. Adjustable parameters are defined as “any device, system, element of design that someone can adjust (including those which are difficult to access) and that, if adjusted, may affect emissions or engine performance during emission testing or normal in-use operation.” 40

1 C.F.R. § 1054.801; California 1054 Test Procedures, § 1054.801.

2 **D. Defeat Device and Tampering Prohibition**

3 39. Certification applications must include sufficient detail to allow EPA and CARB
4 to evaluate whether the AECDs are consistent with the defeat device prohibition. 40 C.F.R. §
5 1054.205(b); California 1054 Test Procedures, § 1054.205(b). A defeat device is an AECD “that
6 reduces the effectiveness of emission controls under conditions that the engine may reasonably
7 be expected to encounter during normal operation and use.” 40 C.F.R. § 1054.115(e); California
8 1054 Test Procedures, § 1054.115(e). Engines equipped with defeat devices cannot be certified.
9 40 C.F.R. §§ 1054.115(e) and 1068.101(b)(2); California 1054 Test Procedures, § 1054.115(e).

10 40. In the preamble to the final rule promulgating Part 1054, EPA explained:

11 To avoid a situation where engines are designed to control emissions over the test cycle,
12 with less effective controls under similar modes of operation that engines experience in
13 use, we are adding a requirement for manufacturers to provide an explanation in the
14 application for certification if air-fuel ratios are significantly different for governed and
15 ungoverned operation at wide-open throttle, especially for fuel-injected engines.

16 Manufacturers would need to explain why this emission control strategy is not a defeat
17 device.

18 73 Fed. Reg. 59,034, 59,084 (Oct. 8, 2008).

19 **E. Test Procedures**

20 41. Under 40 C.F.R. § 1054.501(b) and California 1054 Test Procedures, §
21 1054.501(b), manufacturers must follow certain procedures outlined in Part 1065 to demonstrate
22 compliance with the exhaust emission standards. Part 1065 governs, among other things:
23 (1) equipment used for engine testing; (2) measurement instruments used for testing;
24 (3) calibration and performance verifications for measurement systems; (4) how to prepare
25 engines for testing, including service accumulation; (5) how to run an emission test over a
26 predetermined duty cycle; (6) test procedure calculations; (7) fuels, engine fluids, analytical
27 gases, and other calibration standards; and (8) special procedures related to oxygenated fuels.

28 42. The Part 1065 testing procedures apply to MY 2013 and later Small SI engines.

1 See 40 C.F.R. §§ 1054.15(b), 1054.145(j). However, testing results which were obtained using
 2 the previous test procedures (i.e., Part 90) for a MY 2012 or earlier engine may still be relied on
 3 as carryover data in accordance with 40 C.F.R. § 1054.235(d) provided that the design is
 4 unchanged and emissions are expected to be identical. In California, California 1065 Test
 5 Procedures apply to MY 2013 and later SORE and LSI engines, except that manufacturers are
 6 allowed to use the 2005-2012 California Test Procedures for the 2013 and 2014 model years, and
 7 manufacturers can continue to use data based on the test procedures in the 2005-2012 California
 8 Test Procedures for engine families in 2014 and later model years, provided they use carryover
 9 emission data under 40 CFR 1054.235(d) for that engine family. California 1054 Test
 10 Procedures, § 1054.145.

11 **F. Aging Emissions Components**

12 43. An emission family is considered in compliance with the emission standards in 40
 13 C.F.R. §1054.101(a) if all emission-data engines representing that family have test results
 14 showing deteriorated emission levels at or below the standards. 40 C.F.R. § 1054.240(a);
 15 California 1054 Test Procedures, § 1054.240(a). “Deteriorated emission level” is defined as “the
 16 emission level that results from applying the appropriate deterioration factor to the official
 17 emission results of the emission-data engine.” 40 C.F.R. § 1054.801; California 1054 Test
 18 Procedures, § 1054.801.

19 44. To establish deterioration factors, manufacturers must age emission data engines
 20 and conduct testing towards the middle and end of their useful life (up to 1,000 hours). To ensure
 21 valid test results, when conducting testing on emission data engines—whether low-hour,
 22 midpoint, or end of useful life—the engines must be “tested as they will be produced,” which
 23 “include[s] consideration of wear and other causes of deterioration expected under typical
 24 consumer use when they measure emission from the emission data engine.” 40 C.F.R. §§
 25 1054.235(a) and 1054.245(b); California 1054 Test Procedures, §§ 1054.235(a) and
 26 1054.245(e)(2)(i). Emission-related components (e.g., catalysts, oxygen sensors, etc.) must be
 27 aged as well when conducting midpoint and end of useful life testing. 40 C.F.R. §§ 1054.235(a)
 28 and 1054.245(b); California 1054 Test Procedures, §§ 1054.235(a) and 1054.245(e)(2)(ii). *See*

also 40 C.F.R. §§ 1065.410 (establishing what type of maintenance is permissible when aging an engine for end of useful life emission testing) and 1054.245(b)(9) (requiring that manufacturers use good engineering judgment when establishing deterioration factors).

G. Amendments to Certification Applications

45. After manufacturers have been issued a COC, manufacturers are required to amend their certification application (commonly referred to as a “running change”) before:

- (1) changing a configuration in an emission family in a way that may affect emissions, or
- (2) changing any of the components described in the application for certification. 40 C.F.R. §§ 1054.225(a)(1)-(2); California 1054 Test Procedure, § 1054.225(a)(1)-(2). In addition, manufacturers are required to submit a running change any time they seek to modify an FEL for an emission family before the end of the model year. 40 C.F.R. § 1054.225(a)(3); 13 CCR § 2408(g)(1)(B).

H. PLT Testing

46. A manufacturer must demonstrate compliance with the applicable emission standards for each of its engine families by performing production line testing (“PLT”). *See* 40 C.F.R. § 1054.300; 13 CCR § 2407 *et seq.*; California 1054 Test Procedure, § 1054.300.

47. The PLT requirements for Small SI engines are found in 40 C.F.R. Part 1054, Subpart D and California 1054 Test Procedures, Subpart D.

48. PLT involves randomly selecting engines from the end of the assembly line and testing those engines to demonstrate that the applicable emission standards are being met. 40 C.F.R. §§ 1054.310(b) and 1054.305(a); 13 CCR § 2407(b)(7).

49. Engines selected for testing must be assembled in a way that is representative of other engines in the engine family. 40 C.F.R. § 1054.305.

50. Once an engine is selected for testing, it may not be adjusted, repaired, prepared, or modified except under specific, limited circumstances. 40 C.F.R. § 1054.305(b); 13 CCR § 2407(a)(4).

51. The emission results from PLT are used to determine (a) the minimum number of engines from the engine family that must be tested and (b) whether the engine family, as a

1 whole, meets the applicable emission standards.

2 52. The minimum number of engines that must be tested is determined by the
3 required sample-size (sometimes referred to as the “N-value”) equation. The federal sample-size
4 equation is set forth in 40 C.F.R. § 1054.310(c) and California’s sample size equation is set forth
5 in 13 CCR § 2407(c)(2)(B)(1).

6 53. Whether an engine family, as a whole, meets the applicable emission standards is
7 determined by the “Cumulative Sum” (“CumSum”) equation. The CumSum equation is set forth
8 in 40 C.F.R. § 1054.315(b) and 13 CCR § 2407 (c)(3).

9 54. If an engine fails its PLT emission test, manufacturers may fix the engine to
10 correct the problem and re-test the engine. If the engine passes a re-test it can be sold, but the
11 results of the re-tests cannot be included in the required sample-size and CumSum calculations
12 unless the manufacturer makes the same modification to every other engine in that engine
13 family. *See* 40 C.F.R. § 1054.305(b); 13 CCR §§ 2407(c)(3)(A)(4) and 2407(d)(6).

14 **I. PLT Reports**

15 55. A manufacturer is required to report certain information about its production line
16 testing to EPA and CARB (hereafter “PLT report”). 40 C.F.R. § 1054.345(a); 13 CCR §
17 2407(c)(4).

18 56. Each PLT report must contain the information set forth in 40 C.F.R. § 1054.345,
19 including “all initial test results; final test results; and final deteriorated test results for all tests”
20 and “the CumSum analysis required in § 1054.315 and the sample-size calculation required in §
21 1054.310 for each engine family.” 40 C.F.R. §§ 1054.345(a)(6), (8). California requires similar
22 information. *See* 13 CCR §§ 2407(c)(4)(E)(1)-(11).

23 **J. Evaporative Emissions**

24 57. California’s evaporative emission standards includes diurnal performance
25 standards. “Evaporative emissions” are “emissions that result from the evaporation of reactive
26 organic gases into the atmosphere.” 13 CCR § 2752(a)(6). Any engine or equipment that is
27 manufactured for sale, sold, or offered for sale in California, or that is introduced, delivered, or
28 imported into California for introduction into commerce, must have an evaporative emission

control system that has been certified and labeled to performance-based standards (expressed in grams of hydrocarbons per day (g/day)). *See* 13 CCR §§ 2754-2765.

K. Enforcement Provisions

58. Section 213(d) of the Act, 42 U.S.C. § 7547(d), provides that regulations applicable to nonroad Small SI engines shall be enforced in the same manner as the standards for new motor vehicles and new motor vehicle engines. The standards for new motor vehicles and new motor vehicle engines are enforced pursuant to Sections 203 (Prohibited Acts), 204 (Actions to Restrain Violations), and 205 (Civil Penalties), 42 U.S.C. §§ 7522, 7523, and 7524.

59. This Court has jurisdiction to restrain violations of Section 7522(a). 42 U.S.C. §§7522(a), 7523(a).

60. Anyone who violates Section 203(a)(1) of the Act, 42 U.S.C. § 7522(a)(1), is subject to a penalty of up to \$25,000 per engine. 42 U.S.C. § 7524(a). Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended, the maximum penalty for violations occurring after January 12, 2009 and before November 3, 2015 is \$37,500 per engine. 40 C.F.R. § 19.4. The maximum penalty for violations occurring after November 2, 2015 is \$47,357 per engine. 40 C.F.R. § 19.4.

61. Anyone who violates Section 203(a)(3)(B) of the Act, 42 U.S.C. § 7522(a)(3)(B), is subject to a penalty of up to \$2,500 per engine. 42 U.S.C. § 7524(a). Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended, the maximum penalty for violations occurring after January 12, 2009 and before November 3, 2015 is \$3,750 per engine. 40 C.F.R. § 19.4. The maximum penalty for violations occurring after November 2, 2015 is \$4,735 per engine.

62. Anyone who violates Section 203(a)(2) of the Act, 42 U.S.C. § 7522(a)(2), is subject to a penalty of up to \$25,000 per day of violation. 42 U.S.C. § 7524(a). Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended, the maximum penalty for violations occurring after January 12, 2009 and before November 3, 2015 is \$37,500 per day of violation. 40 C.F.R. § 19.4. The maximum penalty for violations occurring after November 2, 2015 is \$47,357 per day of violation.

63. Under California's Health and Safety Code § 43016, anyone who violates "any regulation of the state board" shall be subject to a civil penalty of up to \$500 per SORE engine, and under California Health and Safety Code § 43154 subject to a civil penalty of up to \$5,000 per LSI engine.

GENERAL ALLEGATIONS

64. Kohler manufactures nonhandheld Small SI engines that are intended for sale in the United States, including in California. These engines must be covered by a valid COC issued by EPA and/or an EO from CARB, *see* CAA § 203(a)(1), 42 U.S.C. § 7522(a)(1); Cal. Health & Saf. Code § 43102, 13 CCR §§ 2400(a)(2), 2430(a)(2), and comply with the requirements of 40 C.F.R. Parts 90, 1054, 1065, and/or 1068 or 13 CCR §§ 2403 *et seq.*, 2407 *et seq.*, 2408 *et seq.*, 2409 *et seq.*, and 2433 *et seq.*

65. From 2010 to 2016, Kohler applied for and received COCs and EOs purportedly covering millions of Small SI engines, including COCs and EOs for each engine family listed in Table 1 below. These engines were sold to original equipment manufacturers and distributors within the United States, including in California.

Table 1 Kohler Engine Families Not Covered By a Valid COC or EO (Families in plain font are carbureted engines; families in <i>italicized</i> font are EFI engines; families in <i>bold italicized</i> font are EFI engines equipped with Delphi ECMs, defined as Subject Engines below.)					
MY 2011	MY 2012	MY 2013	MY 2014	MY 2015	MY 2016
BKHXS.1491GB	CKHXS.1491GB	DKHXS.1491GA	EKHXS.1491GA	FKHXS.1491GA	GKHXS.1491GA
BKHXS.1491GD	CKHXS.1731GB	DKHXS.1491GB	EKHXS.1491GB	FKHXS.1491GB	GKHXS.1731GB
BKHXS.1731GB	CKHXS.1961GA	DKHXS.1731GB	EKHXS.1731GB	FKHXS.1731GB	GKHXS.1731GC
BKHXS.1731GD	CKHXS.2081GA	DKHXS.1961GA	EKHXS.1961GA	FKHXS.1961GA	GKHXS.1961GA
BKHXS.1961GA	CKHXS.2772GA	DKHXS.2081GA	EKHXS.1961GC	FKHXS.1961GC	GKHXS.1961GC
BKHXS.2081GA	CKHXS.4262NP	DKHXS.2772GA	EKHXS.2081GA	FKHXS.2081GA	GKHXS.2081GA
BKHXS.2081GD	CKHXS.4292GA	DKHXS.4262NP	EKHXS.2772GA	FKHXS.2772GA	GKHXS.2772GA
BKHXS.2772GA	CKHXS.5972GB	DKHXS.4292GA	EKHXS.4292GA	FKHXS.4292GA	GKHXS.2772TF

1	BKHXS.4262NP	CKHXS.5972GN	DKHXS.5972GB	EKHXS.5972GB	FKHXS.5972GB	GKHXS.4292GA
2	BKHXS.4292GA	CKHXS.5972GW	DKHXS.5972GN	EKHXS.5972GN	FKHXS.5972GN	<i>GKHXS.4292PD</i>
3	BKHXS.5972GB	CKHXS.6242GC	DKHXS.5972GW	EKHXS.5972GW	FKHXS.5972GW	GKHXS.4292TF
4	BKHXS.5972GN	<i>CKHXS.6742GA</i>	DKHXS.6242GC	EKHXS.6242GC	FKHXS.5972NB	GKHXS.5972GB
5	BKHXS.5972GW	CKHXS.6742GC	<i>DKHXS.6742GA</i>	<i>EKHXS.6742GA</i>	FKHXS.6242GC	GKHXS.5972NB
6	BKHXS.6242GA	CKHXS.6742GG	DKHXS.6742GC	EKHXS.6742GC	FKHXS.6742GC	GKHXS.6242GC
7	BKHXS.6242GC	<i>CKHXS.6942PC</i>	DKHXS.6742GG	EKHXS.6742GG	FKHXS.6742GG	GKHXS.6742GC
8	<i>BKHXS.6742GA</i>	CKHXS.7252GB	<i>DKHXS.6942PC</i>	<i>EKHXS.6942PC</i>	<i>FKHXS.6942PC</i>	GKHXS.6742GG
9	BKHXS.6742GC	CKHXS.7252GC	DKHXS.7252GB	EKHXS.7252GB	<i>FKHXS.6942PD</i>	<i>GKHXS.6942PD</i>
10	BKHXS.6742GG	CKHXS.7252GV	DKHXS.7252GC	EKHXS.7252GC	FKHXS.7252GB	GKHXS.7252GC
11	<i>BKHXS.6942PC</i>	CKHXS.7252LA	DKHXS.7252GV	EKHXS.7252GV	FKHXS.7252GC	GKHXS.7252GV
12	BKHXS.7252GB	CKHXS.7252NA	DKHXS.7252LA	EKHXS.7252LA	FKHXS.7252GV	GKHXS.7252LA
13	BKHXS.7252GC	<i>CKHXS.7252PC</i>	DKHXS.7252NA	EKHXS.7252NA	FKHXS.7252LA	GKHXS.7252NA
14	BKHXS.7252GV	CKHXS.7472GC	<i>DKHXS.7252PC</i>	<i>EKHXS.7252PC</i>	FKHXS.7252NA	GKHXS.7252NB
15	BKHXS.7252LA	<i>CKHXS.7472PC</i>	DKHXS.7472GC	EKHXS.7472GC	FKHXS.7252NB	GKHXS.7252ND
16	BKHXS.7252NA	<i>CKHXS.7472PH</i>	<i>DKHXS.7472PC</i>	<i>EKHXS.7472PC</i>	FKHXS.7252ND	GKHXS.7472GB
17	<i>BKHXS.7252PC</i>	CKHXS.9992GC	<i>DKHXS.7472NC</i>	<i>EKHXS.7472NC</i>	<i>FKHXS.7252PC</i>	GKHXS.7472GC
18	BKHXS.7472GC	CKHXS.9992GD	<i>DKHXS.7472PH</i>	<i>EKHXS.7472PH</i>	FKHXS.7472GC	GKHXS.7472GD
19	<i>BKHXS.7472PC</i>	CKHXS.9992NA	DKHXS.9992GC	EKHXS.9992GC	<i>FKHXS.7472PC</i>	GKHXS.7472GE
20	<i>BKHXS.7472PH</i>		DKHXS.9992GD	EKHXS.9992GD	<i>FKHXS.7472PD</i>	<i>GKHXS.7472PC</i>
21	<i>BKHXS.7472PM</i>		DKHXS.9992NA	EKHXS.9992NA	<i>FKHXS.7472PM</i>	<i>GKHXS.7472PD</i>
22	BKHXS.9992GC		<i>DKHXS.9992PC</i>	<i>EKHXS.9992PC</i>	<i>FKHXS.7472NC</i>	<i>GKHXS.7472PE</i>
23	BKHXS.9992NA				<i>FKHXS.7472PH</i>	<i>GKHXS.7472NC</i>
24					<i>FKHXS.8242PD</i>	<i>GKHXS.7472ND</i>
25					FKHXS.9992GC	<i>GKHXS.7472PH</i>
26					FKHXS.9992DA	<i>GKHXS.7472PM</i>
27					<i>FKHXS.9992PC</i>	<i>GKHXS.8242PD</i>
28						

				<i>FKHXS.9992PD</i>	<i>GKHXS.8242ND</i>
					<i>GKHXS.9992GC</i>
					<i>GKHXB.9992DA</i>
					<i>GKHXS.9992PD</i>

FIRST CLAIM FOR RELIEF

(Violations of Section 203(a)(1) of the Act: Introducing into Commerce Engines

Not Covered by a Certificate of Conformity)

66. The foregoing paragraphs are re-alleged and incorporated herein by reference.

67. Kohler submitted to EPA applications for COCs which included, among other things, information pertaining to test cycle selection, test procedures, applicable emissions limit(s), establishment of deterioration factors, and AECDs and adjustable parameters equipped on the engines.

68. A substantial majority of the Small SI engines within the engine families referenced in Table 1 manufactured by Kohler were not covered by a COC because the engines did not conform in all material respects to their certification applications, in violation of Section 203(a)(1) of the Act, 42 U.S.C. § 7522(a)(1). These engines did not conform to their certification applications for one or more of the following reasons: (1) using the wrong test cycle, (2) not fully complying with the test procedures Kohler certified to, (3) failing to comply with the applicable emission limits, (4) failing to age emission-related components for deterioration factor testing, (5) failing to disclose AECDs and adjustable parameters equipped on the engines, and/or (6) changes were made to the production engines without amending the certification application covering those engines.

69. Kohler violated and continues to violate Section 203(a)(1) of the Act, 42 U.S.C. § 7522(a)(1), by selling, offering for sale, introducing into commerce, delivering for introduction into commerce, or importing new engines that were not covered by a COC, or by causing any of the foregoing acts.

70. Each such violation of Section 203(a)(1) of the Act, 42 U.S.C. § 7522(a)(1), is a

1 separate offense with respect to each new engine.

2 71. Pursuant to Section 205(a) of the Act, 42 U.S.C. § 7524(a), 40 C.F.R. § 19.4, and
3 40 C.F.R. § 1068.101(a)(1), Kohler is liable for civil penalties of up to \$47,357 for each new
4 engine not covered by a certificate of conformity.

5 **SECOND CLAIM FOR RELIEF**

6 (Violations of Section 203(a)(1) of the Act: Introducing into Commerce Engines

7 Not Covered by a Certificate of Conformity – Subject Engines)

8 72. The foregoing paragraphs are re-alleged and incorporated herein by reference.

9 73. From 2010 to 2016, Kohler applied for and received COCs for Small SI engine
10 families that included engines equipped with Delphi ECMs (“Subject Engines”), which are
11 denoted in bold typeface in Table 1.

12 74. On or about November 26, 2008, Kohler employees completed development of a
13 calibration for its Subject Engines (“Subject Calibration”).

14 75. A calibration includes, among other things, a fueling strategy. The fueling
15 strategy for Small SI engines senses engine speed and manifold absolute pressure (“MAP”) and
16 activates the fuel injector(s) to inject into each cylinder a commanded amount of fuel based on
17 the engine speed and MAP inputs. The fueling strategy within the calibration is therefore an
18 “element of design” within the meaning of the CAA.

19 76. The Subject Calibration commanded more fuel (i.e., ran rich) at 3,060 rpm, and
20 commanded much less fuel (i.e., ran lean) at speeds above 3,060 rpm. Therefore, the fueling
21 strategy in the Subject Calibration is an AECD.

22 77. Kohler failed to disclose the fueling strategy in the Subject Calibration in its COC
23 applications covering the Subject Engines.

24 78. The fueling strategy in the Subject Calibration does not meet any of the
25 exemptions outlined in 40 C.F.R. § 1054.115(c) because it was not disclosed in Kohler’s
26 certification applications, and (1) the condition of concern (i.e., running lean at speeds above
27 3,060 rpm) was not substantially included in the applicable duty cycle test procedures because
28 Kohler selected the wrong test cycle, (2) the design is not necessary to prevent engine damage or

accidents, and (3) the fueling strategy did not only apply at start up. The preamble to the final rule promulgating Part 1054 stated that engines designed to control emissions over the test cycle by having a lower air-fuel ratio when compared to normal in-use operation would be considered engines equipped with defeat devices.

79. The Subject Engines did not conform to the certification applications because the Subject Engines were equipped with an undisclosed AECD, and therefore were not covered by the COCs.

80. Kohler violated Section 203(a)(1) of the Act, 42 U.S.C. § 7522(a)(1), by selling, offering for sale, introducing into commerce, delivering for introduction into commerce, or importing new engines that were not covered by a COC, or by causing any of the forgoing acts.

81. Each such violation of Section 203(a)(1) of the Act, 42 U.S.C. § 7522(a)(1), is a separate offense with respect to each new engine.

82. Pursuant to Section 205(a) of the Act, 42 U.S.C. § 7524(a), 40 C.F.R. § 19.4, and 40 C.F.R. § 1068.101(a)(1), Kohler is liable for civil penalties of up to \$47,357 for each new engine not covered by a certificate of conformity.

THIRD CLAIM FOR RELIEF

(Violations of Section 203(a)(3)(B): Manufacture, Sale, Offering for Sale, and Installation of Defeat Devices on the Subject Engines)

83. The foregoing paragraphs are re-alleged and incorporated herein by reference.

84. The Subject Calibration is a “component” within the meaning of the Act. Therefore, Kohler manufactured, sold, offered for sale, or installed components intended for use on the Subject Engines.

85. The Subject Calibration was installed on all of the Subject Engines (except for certain MY 2016 engines that were equipped with an updated calibration), which are denoted in bold typeface in Table 1.

86. All of the Subject Engines were certified under Test Cycle A (i.e., tested at 3,060 rpm) but should have been certified under Test Cycle B (i.e., tested at 3,600 rpm) because many of the engines were used in rated speed equipment.

1 87. Because the Subject Calibration commanded more fuel at the certified test point
 2 (i.e., 3,060 rpm), HC + NOx emissions during certification testing were substantially lower than
 3 HC + NOx emissions at higher speeds (i.e., how the engines operated in-use). Therefore, a
 4 principal effect of the fueling strategy in the Subject Calibration was to bypass, defeat, or render
 5 inoperative an element of design installed on the Subject Engines.

6 88. Kohler was aware that the Subject Engines operated at speeds substantially above
 7 3,060 rpm in real-world operation.

8 89. Kohler “knew or should have known” that the fueling strategy in the Subject
 9 Calibration bypassed, defeated, or rendered inoperative an emission control strategy because it
 10 was designed to maximize emissions performance during certification testing even though it was
 11 not representative of in-use operation.

12 90. Kohler violated Section 203(a)(3)(B) of the Act, 42 U.S.C. § 7522(a)(3)(B), by
 13 manufacturing, selling, offering for sale, or installing “defeat devices” on the Subject Engines, or
 14 by causing any of the foregoing acts.

15 91. Each part or component that constitutes a “defeat device” manufactured, sold,
 16 offered for sale, or installed on the Subject Engines (or the causing thereof) is a separate
 17 violation of Section 203(a)(3)(B) of the Act, 42 U.S.C. § 7522(a)(3)(B).

18 92. Pursuant to Section 205(a) of the Act, 42 U.S.C. § 7524(a), 40 C.F.R. § 19.4, and
 19 40 C.F.R. § 1068.101(b)(2), Kohler is liable for civil penalties of up to \$4,735 for each Subject
 20 Engine equipped with the Subject Calibration.

21 **FOURTH CLAIM FOR RELIEF**

22 (Violations of Section 203(a)(2) of the Act: Failure to Submit Complete or Accurate Reports)

23 93. The foregoing paragraphs are re-alleged and incorporated herein by reference.

24 94. Each certification application, ABT report, and PLT report is a “report” within the
 25 meaning of Section 208(a) of the CAA, 42 U.S.C. § 7542(a).

26 95. During the relevant period, Kohler failed to disclose one or more AECDs for
 27 several EFI engine families and nearly all of the carbureted engine families identified in Table 1.
 28 In addition, all of the carbureted engine families identified in Table 1 were equipped with

undisclosed adjustable parameters. By failing to disclose these AECDs/adjustable parameters in its certification applications, Kohler submitted inaccurate or incomplete reports to EPA.

96. Kohler was required to perform production line testing, in accordance with 40 C.F.R. Part 1054, Subpart D, to demonstrate compliance with the applicable emission standards. Kohler was required to submit periodic PLT reports to EPA, containing the information specified in 40 C.F.R. § 1054.345(a). These reports were required to be accurate and complete. 40 C.F.R. § 1068.101(a)(2). *See also* 40 C.F.R. § 1054.345(c). Kohler submitted PLT reports to EPA which omitted certain PLT tests or failed to include the minimum number of PLT tests required by the regulations, in violation of Section 203(a)(2)(A) of the Act, 42 U.S.C. § 7522(a)(2)(A), 40 C.F.R. § 1054.345(c), and 40 C.F.R. § 1068.101(a)(2).

97. Based on Kohler's use of the wrong test cycle, wrong test procedure, and defeat devices, Kohler understated the emissions values in its ABT reports, which resulted in Kohler generating more HC + NO_x credits than it was entitled to generate.

98. Kohler also reported inaccurate FEL values for certain engine families in its ABT reports.

99. Kohler violated Section 203(a)(2) of the Act, 42 U.S.C. § 7522(a)(2), by failing to submit complete and accurate reports.

100. Each incomplete or inaccurate report is a separate violation of Section 203(a)(2) of the Act, 42 U.S.C. § 7522(a)(2).

101. Pursuant to Section 205(a) of the Act, 42 U.S.C. § 7524(a), 40 C.F.R. § 19.4, and 40 C.F.R. § 1068.101(a)(2), Kohler is liable for civil penalties of up to \$47,357 per day of violation for each reporting violation.

FIFTH CLAIM FOR RELIEF

(Violations of California Health and Safety Code §§ 43016 and 43154: Introducing into California Engines Not Covered by an EO)

102. The foregoing paragraphs are re-alleged and incorporated herein by reference.

103. During the relevant period, Kohler applied for and received EOs for SORE and LSI engine families identified in Table 1, purportedly covering engines that were sold to original

1 equipment manufacturers and distributors within California.

2 104. Kohler submitted to CARB applications for EOs, which included, among other
3 things, information pertaining to test cycle selection, test procedures, applicable emissions
4 limit(s), establishment of deterioration factors, and AECDs and adjustable parameters equipped
5 on the engines.

6 105. These new engines were not covered by an EO because the engines did not
7 conform in all material respects to their certification applications, in violation of 13 CCR §§
8 2403 and 2433. These engines did not conform to their certification applications for one or more
9 of the following reasons: (1) using the wrong test cycle, (2) using the wrong test procedures, (3)
10 failing to comply with the applicable emission limits, (4) failing to age emission-related
11 components for deterioration factor testing, (5) failing to disclose AECDs and adjustable
12 parameters equipped on the engines, and/or (6) changes were made to the production engines
13 without amending the certification application covering those engines.

14 106. Kohler violated 13 CCR §§ 2403(b)(1) and 2433 by manufacturing for sale,
15 selling, offering for sale, introducing, delivering, or importing SORE and LSI engines into the
16 State of California that were not covered by an EO, or by causing any of the foregoing acts.

17 107. Each such violation of 13 CCR §§ 2403(b)(1) and 2433 is a separate offense with
18 respect to each new engine.

19 108. Pursuant to the California's Health and Safety Code sections 43016 and 43154,
20 Kohler is liable for a civil penalty of up to \$500 for each SORE engine that is in violation of the
21 regulation and \$5,000 for each LSI engine that is in violation of the regulation.

22 **SIXTH CLAIM FOR RELIEF**

23 (Violations of California Health and Safety Code §§ 43016 and 43154: Introducing into
24 California Engines Not Covered by an EO – California Subject Engines)

25 109. The foregoing paragraphs are re-alleged and incorporated herein by reference.

26 110. During the relevant period, Kohler applied for and received EOs for SORE and
27 LSI engine families equipped with Delphi ECMs, purportedly covering engines in California
28 ("California Subject Engines"), which include all engine families denoted in bold in Table 1

1 except engine families FKHXS.9992PC and FKHXS.9992PD.

2 111. Kohler failed to disclose the fueling strategy in the Subject Calibration in its EO
3 applications covering the Subject Engines. California 1054 Test Procedure, § 1054.115(c).

4 112. These new engines did not conform in all material respects to the certification
5 applications because the California Subject Engines were equipped with an undisclosed AECD,
6 and therefore were not covered by the EOs.

7 113. Kohler violated 13 CCR §§ 2400(a)(2) and 2430(a)(2), by manufacturing for sale,
8 selling, offering for sale, introducing into commerce, delivering for introduction into commerce,
9 or importing new engines that were not covered by an EO, or by causing any of the forgoing
10 acts.

11 114. Each such violation of 13 CCR §§ 2400(a)(2) and 2430(a)(2) is a separate offense
12 with respect to each new engine.

13 115. Pursuant to the California's Health and Safety Code sections 43016 and 43154,
14 Kohler is liable for a civil penalty of up to \$500 for each SORE engine that is in violation of the
15 regulation and \$5,000 for each LSI engine that is in violation of the regulation.

16 **SEVENTH CLAIM FOR RELIEF**

17 (Violations of California Health and Safety Code §§ 43016 and 43154: Manufacture, Sale,
18 Offering for Sale, and Installation of Defeat Devices on California Subject Engines)

19 116. The foregoing paragraphs are re-alleged and incorporated herein by reference.

20 117. A calibration strategy is a "component" within the meaning of the 13 CCR §
21 2403(d) and 13 CCR § 2433(d), which incorporates the prohibitions in California Test Procedure
22 1054.115. Therefore, Kohler manufactured, sold, offered for sale, or installed components
23 intended for use on the California Subject Engines.

24 118. Kohler was aware that the California Subject Engines operated at speeds
25 substantially above 3,060 rpm in real-world operation and therefore "knew or should have
26 known" that the fueling strategy in the California Subject Calibration bypassed, defeated, or
27 rendered inoperative an emission control strategy because it was designed to maximize emissions
28 performance during certification testing even though it was not representative of in-use

operation.

119. Kohler violated 13 CCR §§ 2403(d) and 2433(d) by manufacturing, selling, offering for sale, or installing “defeat devices” on new SORE and LSI engines, or by causing any of the foregoing acts.

120. Each part or component that constitutes a “defeat device” manufactured, sold, offered for sale, or installed on new SORE and LSI engines (or the causing thereof) is a separate violation of 13 CCR §§ 2403(d) and 2433(d).

121. Pursuant to California’s Health and Safety Code sections 43016 and 43154, Kohler is liable for a civil penalty of up to \$500 for each SORE engine that is in violation of the regulation and \$5,000 for each LSI engine that is in violation of the regulation.

EIGHTH CLAIM FOR RELIEF

(Violations of California Health and Safety Code §§ 43016 and 43154:

Failure to Submit Complete or Accurate Reports)

122. The foregoing paragraphs are re-alleged and incorporated herein by reference.

123. Each certification application, ABT report, and PLT report is a “report” within the meaning of 13 CCR §§ 2403, 2407(c)(4)(E), 2408(i), and 2433.

124. During the relevant period, Kohler failed to disclose one or more AECDs for several EFI engine families and nearly all of the carbureted engine families identified in Table 1. In addition, all of the carbureted engine families identified in Table 1 were equipped with undisclosed adjustable parameters. By failing to disclose these AECDs/adjustable parameters in its certification applications, Kohler submitted inaccurate or incomplete reports to CARB.

125. Kohler was required to perform production line testing, in accordance with California 1054 Test Procedures, Subpart D, to demonstrate compliance with the applicable emission standards. Kohler was required to submit quarterly PLT reports to CARB, containing the information specified in 13 CCR § 2407(c)(4). These reports were required to be accurate and complete. Kohler submitted incomplete PLT reports to CARB, which omitted certain PLT tests or failed to include the minimum number of PLT tests required by the regulations, in violation of 13 CCR § 2407(c)(4).

126. Based on Kohler's use of the wrong test cycle, wrong test procedure, and defeat devices, Kohler understated the emissions values in its ABT reports, which resulted in Kohler generating more HC + NOx credits.

127. Kohler also reported inaccurate FEL values and failed to include the FEL values for certain engine families in its ABT reports. Kohler also failed to submit certain ABT reports.

128. Kohler violated 13 CCR §§ 2403, 2407(c)(4)(E), 2408(i), and 2433 by failing to submit complete and accurate reports and failing to submit all required reports.

129. Each incomplete, inaccurate, or missing report is a separate violation of 13 CCR §§ 2403, 2407(c)(4)(E), 2408(i), and 2433.

130. Pursuant to California's Health and Safety Code sections 43016 and 43154, Kohler is liable for a civil penalty of up to \$500 for each SORE engine that is in violation of the regulation and \$5,000 for each LSI engine that is in violation of the regulation.

NINTH CLAIM FOR RELIEF

(Violations of California Health and Safety Code § 43016:

Introducing into California Engines Not Covered by an EO)

131. The foregoing paragraphs are re-alleged and incorporated herein by reference.

132. Kohler applied for and received EO U-U-005-0507 for SORE in evaporative family CM1, which included engine family GKHXS.1961GA. These engines were sold to original equipment manufacturers and distributors within California.

133. The emission standard for the CM1 evaporative family is set forth in 13 CCR § 2754. CARB tested Kohler engines and these engines exceeded the evaporative emission standards set forth in 13 CCR § 2765.

134. Engines that were introduced into California did not conform in all material respects to their certification applications because they failed to comply with the applicable evaporative emission limits, in violation of 13 CCR § 2765.

135. Kohler violated 13 CCR §§ 2754 and 2765 by manufacturing for sale, selling,

1 offering for sale, introducing, delivering, or importing SORE engines into the State of California
2 that were not covered by an EO, or by causing any of the foregoing acts.

3 136. Each such violation of 13 CCR §§ 2754 and 2765 are a separate offense with
4 respect to each new engine.

5 137. Pursuant to the California's Health and Safety Code section 43016, Kohler is
6 liable for a civil penalty of up to \$500 for each SORE engine that is in violation of the regulation.

7
8 **PRAYER FOR RELIEF**

9 WHEREFORE, the United States, and the People of the State of California, *ex rel.* CARB
10 request that this Court:

11 A. Assess civil penalties against Kohler for each violation of the applicable
12 provisions of the Act, California Health and Safety Code, and corresponding federal and state
13 regulations, as permitted by law;

14 B. Impose injunctive relief to prevent Kohler from continuing to violate the
15 applicable provisions of the Act, California Health and Safety Code, and corresponding federal
16 and state regulations, as permitted by law;

17 C. Order Kohler to take appropriate steps to remedy its noncompliance, including
18 forfeiting all HC + NOx credits claimed by Kohler based on the under-reporting of emissions
19 values in MYs 2011-2016, and any other mitigation or corrective measures deemed appropriate;

20 D. Award Plaintiffs their costs of this action; and

21 E. Grant such other and further relief as the Court deems just and proper.

22 Respectfully submitted,

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24 FOR THE UNITED STATES OF AMERICA:

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26 JEFFREY BOSSERT CLARK

27 Assistant Attorney General

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